THE HON'BLE MR JUSTICE L. NARASIMHA REDDY

Writ Petition No.289 OF 2007

Dated 08-08-2007

Between:

M/s Fresenius Kabi India Pvt. Ltd.,
Rep. by its Zonal Sales Manager,
Pune.

…Petitioner

And

M/s Andhra Pradesh Health & Medical Housing
and Infrastructure Development Corporation,
Rep. by its Managing Director,
Hyderabad, and another.

…Respondents

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ORDER:

The 1st respondent issued a tender notice dated 15-04-2006 for purchase of 220 items of Drugs to be supplied to Government Hospitals, all over the State. The tender conditions are stipulated in the tender document, annexed to the notification. The procedure involved, evaluation on technical and financial levels. The tenders of only those, who have qualified in technical evaluation, would be opened for financial bids. The petitioner and 2nd respondent submitted their tenders for supply of Tetrastarch (Item No. 207).

The petitioner submits that, it alone undertakes manufacture and supply of Tetrastarch, whereas the product marketed by the 2nd respondent is a different one. It is also stated that the Market Standing Certificate and Performance Certificate produced by the 2nd respondent are, in relation to a totally different product, known as Hydroxy Ethyl Starch (for short '*HES*'), and that the 2nd respondent ought to have been disqualified at the stage of technical evaluation itself. It submitted representations to the 1st respondent, stating that the product sought to be supplied by the 2nd respondent does not accord with the specifications of the drug.

After considering the tenders, submitted by the petitioner, on the one hand, and the 2nd respondent, on the other hand, the 1st respondent awarded the contract to the latter, on the basis of

the prices offered by both of them. The petitioner challenges the award of contract, for supply of Tetrastarch, in favour of the 2nd respondent.

The 2nd respondent filed a counter-affidavit and additional counter-affidavit. It is stated that HES, is a generic name, and the product offered by it, accords with the specifications of Tetrastarch also. It is urged that the rate offered by it, are very competitive, when compared to the one, quoted by the petitioner, and that the acceptance of its tender does not suffer from any illegality.

Sri D. Prakash Reddy, learned Senior Counsel appearing for the petitioner, submits that the Drug - Tetrastarch, has its own specifications, and admittedly, the product, proposed to be supplied by the 2nd respondent was, a different one, and that there was absolutely no basis for the 1st respondent, in accepting the tender of the 2nd respondent. He has referred to the technical data, in detail, and sought to distinguish the Tetrastarch, from HES. He submits that the Market Standing Certificate submitted by the 2nd respondent is, not in respect of the drug, at Sl.No.207 of the tender schedule.

Learned Government Pleader for Medical and Health and Sri P.V.A.Padmanabham, learned counsel for the 2nd respondent, on the other hand, submit that the Technical Evaluation Committee had undertaken meticulous comparison of the concerned drugs, and ultimately opined that HES, offered by the 2nd respondent, would satisfy the specifications.

The petitioner and the 2nd respondent submitted their tenders

for supply of a drug, known as Tetrastarch. The tenderers are under obligation to file the Market Standing Certificate, which is in the form of an experience certificate, in proof of handling of such drug. It is not in dispute that the 2nd respondent sought to supply HES, and its tender was cleared at the technical evaluation stage. The rate quoted by the 2nd respondent are far below, than the one, offered by the petitioner. That resulted in award of contract, in favour of the 2nd respondent.

If one goes by the nomenclature of the drug, offered by the 2nd respondent, and compares it, with the item, at Sl.No.207, of the tender schedule, the plea taken by the petitioner gains acceptance. However, the closer analysis of the matter, discloses that there was no substantial difference between the two.

The material placed by the petitioner, before this Court, discloses that HES is a formula drug, which is administered to plasma related diseases. HES in turn, has three sub-categories, knows as Pentastarch, Hetastarch and Tetrastarch. The classification is done, on the basis of the molecular weight, volume expansion, etc. Within Pentastarch there are three sub-categories, with the strength of 3%, 6% and 10%. All these categories of HES have common clinical usage with slight variation. In the literature placed before this Court, in the form of Ex.R-2/1, it is indicated that Pentastarch and Tetrastarch are of optimum duration, whereas HES is of long duration, in clinical terms. An extra benefit is mentioned, in case of Tetrastarch, *viz.,* that it would have minimum effect on tissue accumulation, and that it can be given to renally impaired patients. Even assuming that there are certain variations, once a technical qualified agency had undertaken evaluation, this Court cannot substitute its opinion.

Another aspect of the matter is, that, even the product manufactured by the petitioner is not Tetrastarch, as such. It is called "*Aminoven*". It may be true that, this is a nearer to, or, by itself, Tetrastarch. However, once the products offered by the petitioner, on the one hand, and the 2nd respondent on the other hand, are found to have met the specification of the concerned drug, the only guiding factor would be, the price structure. Admittedly, the price offered by the petitioner was, about Rs.90/-
in excess, per unit, than what is quoted by the
2nd respondent. In this scenario, it cannot be said that the
1st respondent committed any irregularity or illegality, in accepting the offer of the 2nd respondent. Further, the supply of more than half of the agreed quantity has been completed, and invoices are said to have been placed, for a substantial quantity.

For the foregoing reasons, the writ petition is dismissed. There shall be no order as to costs.

L. NARASIMHA REDDY, J.

Dt.08-08-2007

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